mental to petitioner, after having been advised that their rejection would have that effect (*supra*, pp. 11-13).[12]

The point made at this time is that, since the district court reduced respondents' recovery because of "professional considerations", it was bound to make findings as to the nature of those considerations. The approval below of its failure to do so constitutes such a sharp and unjustified deviation from hitherto accepted criteria as to require review by this Court.

4. The remaining questions are intelligible only in their setting.

The parties stipulated that the availability to petitioner of the money impounded in consequence of *United States* v. *Cold Metal Process Co.*, 164 F. 2d 754, certiorari denied, 334 U. S. 811, 835—and the value of petitioner's Cold Metal stock—"depends upon whether or not further litigation in connection with it is pursued by the government" (R. 22; *supra*, p. 5). A month after petitioner moved for a new trial, the district judge made the following memorandum, notice of which was sent to counsel for the parties (R. 332):

> This motion for a new trial should be held until disposition of the money impounded in the Clerk's office is determined. If that money does not go to Cold Metal, a new trial or modification of the judgment allowed in this case should be made.

No evidence was introduced at the trial, nor afterwards by motion or affidavit, relative to the final disposition of

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[12] If certiorari should be granted, petitioner expects to argue (see Question 6, *supra*, p. 3) that the district court (R. 322) and the court of appeals (R. 404) both erred in holding that no tender was involved simply because the offer was not to pay in cash, since, unquestionably, respondents never objected to the medium of the tender. It is of course hornbook law that objection on the ground that an offer of payment was not in a medium constituting tender must be specifically made at the time, else it is not available afterwards. *Wilke* v. *Smith*, 68 N. E. 2d 386, 388 (Ohio); *Minsky* v. *Zieve*, 255 Mass. 542; *Restatement of Contracts*, Sec. 305.

the impounded funds. By denying, some fifteen months later, both the motion for new trial and the motion for oral argument thereon (R. 332), the district judge deprived petitioner of any opportunity of showing that, in fact, of the impounded funds involved which were released, the United States immediately seized $8,427,807.06, plus $22,-166.27 accrued interest, under a jeopardy assessment to recover taxes allegedly due.[13]

On appeal to the court below, petitioner designated the district judge's memorandum quoted above (R. 338, item 18). Respondents designated eight orders made in other litigation which had directed the return of certain of the impounded Cold Metal funds (R. 344-363; see R. 341-342, item 2). Respondents' motion to strike the district judge's memorandum (R. 383) was granted (R. 407), and petitioner's motion to strike the orders in other cases, on the ground that they had never been introduced in evidence or formally brought to the attention of the district court (R. 382), was denied (R. 407).[14]

A. The district judge's memorandum (R. 332), which alone explains his delay for well over a year in acting on the motion for new trial, was in substance and effect an interlocutory opinion, and as such the Clerk of the District Court was required by Rule 75(g) (*infra*, p. 28) to include that document in the record even in the absence of a designation.[15] True, it was not docketed (R. 332, 384-388); but it should have been, having regard to the command of Rule 79(a) (*infra*, p. 29), (It is proper to note that the record

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[13] The validity of this assessment is in litigation. *The Leon A. Beeghly Fund, etc. Petitioner*, v. *Comissioner of Internal Revenue*, No. 22485 in the Tax Court of the United States.

[14] No error is assigned as to the denial of petitioner's motion to strike the complaint in *Frederick R. Steckel* v. *Leon A. Beeghly et al.*, (R. 364-377), as that document was, at least in part, incorporated by reference at the trial (R.86-87).

[15] The older cases which insist that an opinion is no part of the record are therefore irrelevant. E. g., *England* v. *Gebhardt*, 112 U. S. 502, 503.

in this case reflects another similar failure on the part of the clerk to docket opinions (R. 385-386; cf. R. 325-326).) In any event, docketed or not, the July 1949 memorandum threw a clear light on the district judge's views, made plain that his delay in acting on the motion represented his considered judgment and was not the consequence of either neglect or inadvertence—and it was not simply an offhand or private remark, as the judge's action in initialing it and then sending it to counsel clearly shows (R. 332). Therefore the order of the court below striking the memorandum from the record was more than an abuse of discretion, it was a clear violation of the Rules of Civil Procedure. The action of the court below in this respect is in essential conflict with the ruling of the Eighth Circuit in *Love* v. *Royall*, 179 F. 2d 5, where a motion to strike from the record on appeal documents which had in fact been before the district court was denied, and with the ruling of the Ninth Circuit in *Bowles* v. *Dodge*, 141 F. 2d 969, which looked to the trial judge's opinion in order to find a clue to judicial action which the "record" proper did not otherwise explain.[16]

B. The district judge frankly announced that he would hold the motion for new trial until the disposition of the impounded funds, and that, if the money did not go to Cold Metal, a new trial or a modification of the judgment should be made. In fact, while the money impounded in one set of proceedings brought by the United States went to Cold Metal, a substantial portion of the same money was immediately seized by the United States in another proceeding, a tax matter. Thus the money in fact did not go to Cold Metal—but petitioner was deprived of any opportunity to show that fact.

The vice of the district court's action lay in its looking to the records in other cases without affording petitioner

[16] The order of the Chief District Judge (R. 343) overruling respondents' motion (R. 340, item 3) to strike the memorandum from the record may well rest on the circumstance that, under Rule 75 (h) as amended (*infra*, pp. 28-29), their point could only have been passed on by the court of appeals.

an opportunity to overcome the effects of those other records. The ruling of the court below, approving that course, is diametrically contrary to the Third Circuit's holding in *Funk* v. *Commissioner of Internal Revenue*, 163 F. 2d 796, where the Tax Court was reversed for doing just what the district court did here, viz., taking judicial notice of a record in collateral litigation without giving the affected party an opportunity to overcome the effects of that other record.

C. Since it was error on the part of the district court to look to orders in other cases which had never been introduced in evidence in the case in chief, such orders had no place in the present record, and should have been stricken therefrom. The refusal of the court below to do so was error. Its ruling in this respect is in conflict with the decision of the Third Circuit in *United States* v. *Hoffman*, 185 F. 2d 617, 621, pending on certiorari, No. 513, this Term, and the arbitrary character of its attitude towards petitioner is moreover highlighted by respondents' written concession that, if the district judge's memorandum were stricken, the collateral orders should likewise be stricken (R. 384).

The net result of the foregoing is that petitioner has been denied the opportunity to demonstrate a fact which the district court formally indicated would entitle him to relief, and that the court of appeals, by its erroneous and arbitrary disposition of the parties' motions to strike, has nullified the orderly scheme which the Rules of Civil Procedure prescribe for the settling of the contents of a record on appeal.

CONCLUSION.

This Court would be amply justified in saying here what it said of *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 261: "This case presents irregularities in practice which we think should not be overlooked." The irregularities here injuriously affected petitioner's substantial rights. The petition for certiorari should therefore be granted.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
1009-1015 Tower Building,
Washington 5, D. C.,
Counsel for Petitioner.

FEBRUARY 1951.

APPENDIX.

Rules of Civil Procedure Involved.

The following Federal Rules of Civil Procedure, as amended, are involved in this case:

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

* * * * * *

Rule 75. Record on Appeal to a Court of Appeals.

(a) Designation of Contents of Record on Appeal. Promptly after an appeal to a court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal, unless the appellee has already served and filed a designation. Within 10 days after the service and filing of such a designation, any other party to the appeal may serve and file a designation of additional portions of the

record, proceedings, and evidence to be included. If the appellee files the original designation, the parties shall proceed under subdivision (b) of this rule as if the appellee were the appellant.

* * * * * *

(g) Record to be Prepared by Clerk—Necessary Parts. The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof when a copy is required by the rules of the court of appeals. The copy of the transcript filed as provided in subdivision (b) of this rule shall be certified by the clerk as a part of the record on appeal and the clerk may not require an additional copy as a requisite to certification.

(h) Power of Court to Correct or Modify Record. It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) and (n) of this rule and in Rule 76, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by

error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the court of appeals.

• • • • • •

Rule 79. Books and Records Kept by the Clerk and Entries Therein

(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

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CHARLES ELMORE CR

In the Supreme Court of the United States

OCTOBER TERM, 1950.

No. 544.

ABRAM P. STECKEL,
Petitioner,

vs.

REUBEN L. LURIE and ABRAHAM T. ALPER, co-partners, doing business under the firm name and style of LURIE & ALPER,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO ETITION FOR WRIT OF CERTIORARI.

JOHN J. ADAMS,
JAMES C. DAVIS,
1857 Union Commerce Building,
Cleveland 14, Ohio,
Attorneys for Respondents.

SQUIRE, SANDERS & DEMPSEY,
1857 Union Commerce Building,
Cleveland 14, Ohio,
Of Counsel.

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT OF APPEALS.

Since the filing of the petition herein, the opinion of the Court of Appeals has been reported at 185 F. 2d, 921.

STATEMENT OF THE CASE.

This is a suit brought by the respondents to recover compensation for professional services rendered by them to the petitioner over a period of six years. The period involved extended from January 1, 1935 to December 14, 1940, during which time it is stipulated that the respondents expended 1539¼ days in the service of the petitioner. Respondents also sought to recover the amount of expenses advanced by them to the petitioner during the period they were serving him. The amount of such expenses is stipulated to have been $6,031.80, which with interest to the date of the judgment, aggregated $8,738.07.

A jury was waived and the case tried to the Court. The United States District Court for the Northern District of Ohio entered judgment in favor of the respondents and against the petitioner for $162,663.07, representing $153,925.00 for services and $8,738.07 for expenses (R. 327).

The Court of Appeals fully and independently examined the evidence and concluded with respect to the judgment and findings of the lower court:

> "The findings in this case were not clearly erroneous. The judgment was amply supported by the findings of fact and by the evidence." 185 F. 2d, 921, 932 (R. 407).

Most of the facts were the subject of a stipulation (R. 7 to 81). It is sufficient for an understanding of the case to state that petitioner was the inventor of processes for rolling steel which were covered by certain United States patents (R. 8). At the time petitioner employed respondents, his sole assets consisted of a minority stock interest in The Cold Metal Process Company, a corporation organized to exploit petitioner's patents (R. 8, 9). The Cold Metal Process Company itself was in financial difficulty, being in the hands of a Bankers' Committee, and petitioner was the object of efforts on the part of the majority directors of the company to take away from him his entire stock interest in the company (R. 9). Litigation with respect to the validity of the patents was pending (R. 8, 9).

It was petitioner's purpose in employing respondents that their efforts should be devoted to retaining for him to the maximum practicable his stock interest in The Cold Metal Process Company against the attacks being directed against him, with the hope that the stock so retained would ultimately prove valuable if litigation involving the patents proved successful (R. 11). Respondents were, therefore, employed to represent him in any litigation involving The

Cold Metal Process Company or his stock interest therein and to perform any other services for him which were not a part of litigation, but directed at preserving and enhancing his stock interest in the company (R. 11).

Petitioner was unable to compensate respondents for their services on a definite and assured basis, so it was agreed that their compensation would have to be on a contingent basis (R. 11). The contingency was to be based on the extent to which petitioner could retain his stock and the value which it should ultimately develop (R. 12).

As the Court found, and as the Record amply supports, petitioner's stock which was worthless at the time of the employment of respondents, attained a value at the time respondents' employment terminated of substantially in excess of $1,000,000.00 (R. 329, Finding 5). At the time of the trial, petitioner advanced the opinion that his stock was of a value of $17,000 per share, which for the 376 shares of stock which he had been able to retain represented a value in excess of $6,000,000.00 (R. 86, 87). It was in the light of this general background that the case was tried, findings made by the Court, and judgment entered.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

Stripped to their essentials and removed from the obfuscations of their verbiage, the questions presented by the petition are but two:

1. Do the findings of fact made by the trial court and concurred in by the Court of Appeals support the judgment?

2. Whether review by this Court will be granted because of harmless error committed by the Court of Appeals which the Record clearly discloses did not affect the merits or the result.

ARGUMENT.

In last analysis, the petition represents an effort to obtain still a third review of the factual issues involved in respondents' suit for fees for professional services and expenses. The petition does not disclose any question of general importance, or any substantial conflict between the decision of the court below and decisions of this Court, or of other Courts of Appeals or of Ohio courts.

To the extent that petitioner seeks further review of essentially factual questions, he is met by the well-settled rule of this Court that a writ of certiorari will not be granted to review factual questions which are the subject of concurrent findings by the two courts below. See for example, *Comstock v. Group of Institutional Investors*, 335 U. S. 211. To the extent that petitioner seeks review on other grounds, his petition is without merit.

The Trial Court Found and the Court of Appeals Concurred in the Finding of Ultimate Facts Necessary to Support the Judgment.

The pivotal question, and in fact the only one of substance, presented by the petition is whether or not the findings of fact, concurred in by both courts below, sustain the judgment. Petitioner does not claim that the findings made do not find full support in the evidence. His complaint, rather, is that the trial court, though finding the ultimate facts make no "findings of subsidiary facts" underlying the ultimate facts so found (Pet. 16). This is but to clothe in legal artistry a complaint that the trial court failed to detail the evidence. Such was no part of its duty.[1]

Both this Court and the Courts of Appeals have repeatedly held that the obligation of a trial court in finding

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[1] Petitioner refers to *Kelley v. Everglades District*, 319 U. S. 415, in which the trial court made *no* findings. Mere examination of the findings here discloses the inappositeness of the citation.

facts is to find ultimate facts upon which its judgment must rest rather than to find and detail the evidentiary, i.e. "subsidiary," facts, which underly and support the ultimate facts so found. Illustrative are the following cases:

Burr v. The Des Moines Railroad and Navigation Company, 68 U. S. 99, at p. 102:

> "The statement of facts on which this court will inquire, if there is or is not error in the application of the law to them, is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest."

To the same effect, see *Miller v. Life Insurance Company,* 79 U. S. 285, at p. 301.

United States v. Jones, 176 F. 2d, 278 (Ninth Circuit), at p. 280:

> "Even in ordinary civil actions, when the court has reached a conclusion upon the main issues involved, and has decided them against a litigant, it needs only state the ultimate facts and need not make findings on every incidental fact which the litigant may have sought to put in issue."

Klimkiewicz v. Westminster Deposit & Trust Co., et al., 122 F. 2d, 957 (District of Columbia, Appeals), cert. den. 315 U. S. 805, at p. 958:

> "Criticism is made of the District Court's findings of fact on the ground that they are mere statements of generalities or conclusions and do not meet the requirements of Rule 52 of the New Federal Rules, 28 U. S. C. A. following section 723c, but we think this criticism is not justifiable. The trial court is not required to make findings on all the facts presented and need only find such ultimate facts as are necessary to reach the decision in the case."

To the same effect, see *Heath, et al. v. Helmick,* 173 F. 2d, 157 (Ninth Circuit), at p. 159, Footnote 4, and *Brown Paper Mill Co., Inc. v. Irvin,* 134 F. 2d, 337 (Eighth Circuit).

The Findings of Fact Made by the District Court and Concurred in by the Court of Appeals Speak for Themselves and Fully Support the Judgment.

The District Court, as was its right under the Federal Rules of Civil Procedure,[2] denominated some of its findings as such, included others in its opinion and also announced conclusions of law. The findings and conclusions so made speak for themselves and disclose that both courts below concurred in finding ultimate facts fully supportive of the judgment. The findings were as follows:

> 1. The petitioner and his situation presented very unusual problems. He was the inventor of a highly useful process of rolling steel. He owned a minority interest in the company which held the patents covering that process. The patents were in litigation in many courts and he was involved in extensive litigation with other stockholders over control of his company (R. 321).
>
> 2. The petitioner was fearful that the world was trying to steal his brainchild. This complete loss of faith became his worst affliction and made assistance to him difficult, if not impossible (R. 321).
>
> 3. Petitioner's entire fortune was in his stock. His affairs were intensely complicated and his condition often seemed desperate, but if he could retain his stock holdings until the patents were sustained, his fortune would be secure (R. 321).
>
> 4. They (respondents) assumed the representation of petitioner at a time when he was unable to pay, knowing that he would probably never be able to pay if the litigation regarding his patents failed to sustain his claims (R. 23).
>
> 5. On or about the 31st day of January, 1935, petitioner employed the respondents to represent him in any litigation involving The Cold Metal Process Company or his stock interest therein and to perform any other services for him which were not a part of

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[2] Rule 52(a), copied Appendix II.

litigation, but directed at preserving and enhancing his stock interest in the company, both parties agreeing that respondents' compensation would be contingent upon the reasonable value of the services rendered by respondents for the petitioner and upon petitioner's ability to pay, as represented by and based on the extent to which he could retain his stock against the attacks being made upon him and the value which the stock developed. Petitioner further agreed to pay to the respondents the amount of such expenses as were reasonably necessary to be incurred by them in connection with his representation (R. 328).

6. It was with reference to his affairs, other than the patent litigation, that respondents represented the petitioner (R. 321).

7. Respondents, by virtue of such employment, performed services as attorneys for petitioner during the period from the 31st day of January, 1935 to the 14th day of December, 1940, during which period respondents also provided as a part of their services, the services of Lee M. Friedman (R. 328).

8. Petitioner had no available funds, so respondents extended credit to him. They advanced their own expenses and even advanced cash to petitioner, which cash advances he repaid (R. 322).

9. Not all of respondents' services were strictly legal services. There was considerable time spent in peace efforts among directors, efforts to obtain financing, and numerous conferences, but there was also a vast amount of time spent by respondents and the more experienced trial counsel whom they retained (Lee M. Friedman) in trial work, briefing and argument against formidable opposition (R. 324).

10. Respondents and Lee M. Friedman devoted in rendering professional services for the petitioner, a total of 1539¼ days, 952½ of which days were in Boston, Massachusetts, and 536¾[3] of which days were

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[3] As stated by the Court of Appeals, this figure is an apparent misprint and should be 586¾ instead of 536¾. The stipulation between the parties states the figure to be 586¾ and it was so conceded in the briefs below (Stipulation, R. 81, Footnote to Court of Appeals' opinion No. 2 at 185 F. 2d 921, 929, R. 402).

outside of Boston, Massachusetts, principally in Ohio, and of which days outside Boston 83½ days were devoted by Lee M. Friedman to rendering services for the petitioner (R. 328).

11. Most of the time spent in Ohio was by the youngest of the three Boston lawyers and as to the time spent in Boston, it is probable that each day was not devoted exclusively to the petitioner's affairs. Other business was, no doubt, attended to (R. 324).

12. Most of the litigation in which respondents engaged was not successful if measured against the petitioner's wishes and claims, but the claim of the respondents that the efforts made in petitioner's behalf preserved his interests and prevented complete liquidation is not without merit (R. 322).

13. At the time of the employment of the respondents by petitioner, petitioner's stock in The Cold Metal Process Company was without market value, and at the termination of the employment, such stock was of the value of at least $4,000 per share and of an aggregate value substantially in excess of $1,000,000.00 (R. 329, 322).

14. Petitioner and respondents had differences, and petitioner forbade them to participate further in certain of the litigation pending (R. 322).

15. Petitioner subsequently withdrew his dismissal and re-established the relationship of attorney and client, and requested and accepted further services (R. 322).[4]

16. The patience and devotion of respondents to petitioner's cause was remarkable. Not many men would have been able to sustain their faith and confidence to such an extent and under such circumstances (R. 323).

17. Cleveland counsel rendered services for petitioner similar to those rendered by respondents during a term of one year and were paid about $20,000.00 (R. 323).

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[4] See Exhibit 17 at R. 261, offered in evidence at R. 116.

18. A fair per diem allowance to respondents for an average of all of the days spent in petitioner's services would be $100.00 (R. 324).

19. That during the period of their employment, respondents advanced expenses in connection with their representation of the petitioner in the sum of $6,031.80, which expenses were reasonably necessary to be incurred in connection with the representation by respondents of the petitioner, and no part of which has been paid; that the amount of such expenses, together with interest thereon at 6% per annum from December 14, 1940 (the termination of respondents' employment) was $8,738.07 (R. 329).

20. That the alleged offer of part payment for services made by the petitioner to respondents was not cash or the equivalent of cash and was not a tender. Respondents had a right to decline the offer (R. 322).

Upon the foregoing findings, the trial court concluded:

1. That it was his duty to fix the fee of respondents in view of all of the facts and circumstances revealed by the stipulation, the evidence and the correspondence, taking into account the age and experience of the respondents, the time spent, the services rendered, the amount paid to other counsel for similar services, and the results (R. 323).[5]

2. That the respondents were entitled to recover of petitioner the fair and reasonable value of the services rendered by them and of the services of Lee M. Friedman provided by them to the petitioner, and the amount of expenses advanced by them, with interest on said expenses at the rate of 6% per annum from December 14, 1940 (R. 329).

3. That under all of the circumstances of the case, the fair and reasonable value of the legal services rendered was $153,895.00, and the amount of expenses with interest was $8,738.07 (R. 329).

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[5] The age and experience of respondents and Lee M. Friedman was the subject of a stipulation between the parties, at pp. 23 to 26 of the Record.

4. That respondents were entitled to recover of the petitioner the agregate sum of $162,633.07 (R. 329).

It is submitted that the Court obviously considered all of the evidence and made all findings of ultimate facts necessary to support its judgment.

> "When the Court has reached a conclusion upon the main issues involved and has decided them against a litigant, it need only state the ultimate facts and need not make findings on every incidental fact which the litigant may have sought to put in issue."
>
> *United States v. Jones,* 176 F. 2d 278, 280.

The Allegations of Unprofessional Conduct Present Only Factual Questions Which Were Decided Adversely to Petitioner by Both Courts Below and Present Nothing For the Consideration of This Court.

Petitioner charges that he dismissed the respondents from his employ; that respondents refused to accept such dismissal; and that he offered respondents a partial payment for their services in stock of The Cold Metal Process Company, which they refused. He, therefore, says that respondents should not be entitled to compensation for their services.

There are two answers to petitioner's claims in these respects. In the first place, the facts, as stated or inferred in the petition, are without support in the Record, and in the second place, both courts below fully considered factual questions presented and decided them adversely to petitioner.

It would unduly prolong this brief to detail here the inaccuracies with respect to the Record which are found in the petition on this subject or to argue the merits of the factual issues presented. For the convenience of the Court, however, there is attached as Appendix I a statement of the record facts with respect to the questions presented, together with the findings and comments of the courts below with respect thereto.

The Claim of Error by the Court Below in Ruling on Motions to Strike Presents at Most a Question of Harmless Error Which Did Not Affect any Substantial Right of the Parties.

Petitioner (Pet. 22 to 25) complains of the action of the Court of Appeals in sustaining respondents' motion to strike from the Record an informal memorandum initialed by the trial judge on July 17, 1948 (R. 332), and in overruling petitioner's motion to strike from the Record certain orders of the District Court with respect to the release to The Cold Metal Process Company of several millions of dollars of funds, theretofore impounded in the registry of that Court. It was the respondents' position below, and still is their position, that neither the informal memorandum of July 17, 1948, nor the orders in question, were ever properly any part of the Record in this case.[6]

The memorandum was not an order nor evidence of any judicial act. The Court of Appeals, therefore, was clearly

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[6] It appears without dispute that the District Court's memorandum of July 17, 1948 was neither filed by the clerk nor entered on the docket, as would have been required by Rule 79(a) and (b) (copied in Appendix II) of the Federal Rules of Civil Procedure, had it been understood by either the judge or the clerk to have been a judicial act. It must be assumed that both the court below and the clerk were familiar with the provisions of the Federal Rules of Civil Procedure and intended to comply with their requirements. It must follow (and were the facts otherwise, petitioner would surely have obtained a certificate to that effect from the trial court) that neither the judge nor the clerk understood or intended the memorandum in question to constitute an order, judgment or other formal act of the Court. On its face, it was merely an informal memorandum reflecting the fleeting thoughts of the Court at the time in question, which he was free at any time thereafter to change or modify in any way he saw fit. It in no sense constituted a judicial act. When petitioner improperly designated for inclusion in the Record on appeal this personal and informal memorandum of the trial judge, respondents as a tactical move, not only filed objections to its inclusion, but designated for inclusion in the Record the orders in question but only "in the event that appellee's objections to the inclusion in the Record of Judge Wilkin's memorandum of July 17, 1948 * * * be overruled." (R. 341.)

right in striking from the Record the informal memorandum in question. Respondents concede that the inadvertent act of the Court of Appeals, in failing at the same time to purge the Record of the orders in question, may constitute error. Such error, however, was harmless, did not affect the substantial rights of the parties, and is no ground for the allowance of the petition.

In the first place, *there is absolutely no evidence that the orders in question or the facts which they represented, i.e., the release from the registry of the District Court to The Cold Metal Process Company of several millions of dollars, ever was considered either by the District Court or by the Court of Appeals in reaching the results which obtained in this case.* In the second place, the undisputed evidence properly in the Record, including the stipulation of the parties and the testimony of petitioner himself is entirely adequate to support the findings, concurred in by the two courts, and the judgment below.

The stipulated basis upon which the compensation of respondents was to rest was that it would be contingent upon "the value which the stock developed" (R. 12). The stipulation of the parties and the evidence of the petitioner contained full information, both as to the value of the stock at the time the employment of the respondents terminated and the value which it had attained by the time of the trial.

Petitioner testified that at the time of the termination of respondents' employment in 1940, his stock, in his opinion, was worth $4,000 per share, but that his associates in The Cold Metal Process Company valued the stock at this time at $7,500 per share (R. 85). The trial court apparently adopted respondents' more moderate estimate of the value of the stock and found that its value at the termination of respondents' employment was $4,000 per share, and of an aggregate value substantially in excess of $1,000,000.00 (R. 329, 322).

Of the original shares of stock which petitioner held, he was able to retain, as the result of respondents' efforts,

376 shares which at the value of $4,000 per share, were worth in the aggregate, at the termination of respondents' employment, $1,504,000.00.[7] *The trial court rested his judgment not on the value which the stock had attained at the time of trial, but on the value which petitioner's own undisputed evidence disclosed it had reached at the close of respondents' employment.*

In evaluating the judgment below and in determining the extent to which it is supported by the findings, there is no necessity to examine any evidence as to the value which the stock attained after the termination of respondents' employment, because the judgment was bottomed by both courts below squarely on a finding as to value at that time. However, the increase in the value of the stock between the time when respondents' employment terminated and the time of trial as reflected in the undisputed Record again emphasizes and underlines the conservatism of both courts below with respect to their findings on this aspect of the case.

It appeared that at the time of the trial, petitioner had already received in cash dividends $996,766.00 (R. 21). Moreover, he testified that, in his opinion, after the payment of such dividends, the stock had a residual value of $17,000 per share (R. 86, 87), or an aggregate value for the 376 shares of $6,392,000.00. It follows that no matter what value might be deduced from the facts reflected from such orders, it could not reach the estimate placed upon the stock by the petitioner in his own testimony properly in the Record.

It seems obvious, in the light of the foregoing record, that the inadvertent failure of the Court of Appeals to strike from the Record a series of orders which received

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[7] At the time of respondents' employment, petitioner held 580 shares of the common stock of The Cold Metal Process Company, 160 shares were lost by him in the so-called Option Case (R. 57-63) and 44 shares were sold by him from time to time to defray his living expenses during the period involved, leaving to petitioner 376 shares (R. 88).

the consideration of neither court below, if error, was harmless error, and without prejudice to the substantial rights of the parties.

> "Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. * * * He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. That burden has not been maintained by petitioners."
>
> *Palmer v. Hoffman,* 318 U. S. 109, 116.

CONCLUSION.

The petition discloses no question of general importance nor any conflict on any matter of substance between the decision of the courts below and any decision of this Court or of other Courts of Appeals or of the courts of the State of Ohio. Rather, the petition seeks merely to obtain a third review of facts with respect to the effect of which both courts below have concurred. The petition, therefore, should be denied.

Respectfully submitted,

JOHN J. ADAMS,
JAMES C. DAVIS,
1857 Union Commerce Building,
Cleveland 14, Ohio,
Attorneys for Respondents.

SQUIRE, SANDERS & DEMPSEY,
1857 Union Commerce Building,
Cleveland 14, Ohio,
Of Counsel.

APPENDIX I.

Petitioner's Claim That Respondents Were Dismissed From His Service Is Contrary to the Undisputed Facts and Was Rejected By Both Lower Courts.

It was stipulated (R. 12, Par. 7) that respondents' obligations to petitioner's cause would include not only his representation in all litigation involving The Cold Metal Process Company or his stock interest thereon, but also the performance of other services for him, not a part of litigation, but which might be directed at preserving and enhancing his stock interest in the company. The courts below found that the services actually rendered included not only litigation in various matters, but also many other activities (R. 324). The employment was very general in scope. The petition itself discloses that the litigated matters handled by respondents included the "Federal Case," the "Option Case" and the "Advances Case," and that many other types of service were also rendered (Petitioner, pp. 5 to 7).

As his second reason for the granting of the writ, petitioner alleges that the Record shows that he dismissed respondents from his employ and that they refused to accept such dismissal. This fact is described as "Petitioner's principal substantive defense." The weakness of petitioner's case and the reasons why it was summarily rejected by both courts below becomes apparent upon even a cursory examination of the record.

The dismissal question arose not with respect to respondents' employment generally, but was limited to an effort by the petitioner to terminate respondents' employment in the Federal Case only, while retaining their services with respect to all other matters. The situation with respect to this matter was well summarized by the Court of Appeals in the following excerpts from its opinion in which we have inserted Record references supporting the Court's statements of facts:

"The present claim of appellant that he had discharged appellees as his attorneys is based upon an incident in one of the cases involving The Cold Metal Process Company in the District Couprt, referred to as the 'Federal Case.' That suit had been brought by a nominal plaintiff inspired by appellant seeking to obtain a receiver for the Company." (R. 34.)

"Hearing before a Special Master continued for a period of fifty-one days. The Record exceeded 3500 pages in length, in addition to 300 exhibits (R. 41). Prior to the filing of the Master's report, exhaustive briefs were filed by both parties, and there were three days of oral argument before the Master." (R. 42.)

"Thereafter, the Master filed his report consisting of 191 pages, containing 186 findings of fact, and 24 conclusions of law." (R. 42.)

"On July 30, 1937, the day on which the report was filed, appellant informed appellees that no delay beyond the regular 20 days should be obtained in which to file exceptions, but that the report would have to be attacked boldly and openly as a brazenly prejudicial report * * * by a few proofs of prejudice. I do not mean mere bias, which might be unconscious bias, but downright crooked procedure, consciously designed to protect Beeghly where proofs of his guilt are plain." (R. 45.)

In this situation, respondents and petitioner exchanged substantial correspondence in which respondents sought to explain to petitioner that his substantial rights would be seriously affected if his instructions were to be followed out, which culminated in a meeting between respondents and petitioner, the results of which were set out in a letter

from petitioner to respondents quoted in the footnote.[8] (Exhibit 17, at R. 261, offered in evidence at R. 116).

By his own words, petitioner thereby made it clear that he never intended to dismiss respondents at any time and that the misunderstanding with respect to the Federal Case had been fully resolved.

Here again, both courts below concurred in the conclusion that, if anything, respondents' dismissal by petitioner was partial only and that even to the extent it existed, the dismissal was withdrawn and the complete relationship renewed. The trial court so found (R. 322, 323) and the Court of Appeals clearly confirmed such finding in the following language:

> "At no time did Steckel ever attempt to discharge or dismiss appellees as his attorneys. The most that

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[8] "397 Redonda Road
Youngstown, Ohio.
February 26, 1938.

Mr. Reuben Lurie,

Dear Lurie:

This is to express:

(1) my personal gratitude to you for having come all the way to Youngstown to discuss all our mutual affairs to date instead of my having to travel at all just now to meet you, as had been my intention—

(2) my personal relief after candid discussion of matters in which we had drifted too far apart as a result of the too long distance between Boston and Youngstown—

(3) my belief that this conference will result in best cooperation between us in all the future—

(4) my surprise at seeming to have been misunderstood to desire withdrawal of Lurie and Alper or of Friedman from Option Case or of L. and A. from Advances Case,—neither of these thoughts having been thoughts of mine—

(5) my desire to have all of you remain connected with Federal Case under mutual understanding between us (you and me, Lurie and Steckel) as to what each side (Boston and Youngstown) shall not do independently of the other.

Sincerely yours,"

> he purported to do was to dismiss them from further proceedings in one case out of several in which they were engaged; * * * As to the case in which he attempted to discharge them from preparation of exceptions and brief, such attempted dismissal was withdrawn by Steckel as soon as the parties had a personal interview * * *. We find no merit in the claim that appellees were discharged by Steckel as his attorneys; that they wrongfully continued to represent him; and that, because of such discharge and their conduct, they forfeited any right to compensation for the services they performed on behalf of Steckel up to that time, and subsequently." 185 F. 2d 921, 931 (R. 405).

If this alleged dismissal constitutes "petitioner's principal substantive defense," the concurrent findings of the two lower courts should surely be dispositive of the case.

The Alleged Tender of Partial Payment Made by Petitioner to Respondents Was One Which They Were Neither Personally Nor Professionally Obligated to Accept or Consider.

Petitioner alleges that respondents should be penalized in this Court because they allegedly "refused an unconditional tender of stock and cash, made without prejudice to their assertion of a larger claim, in circumstances highly detrimental to petitioner, * * *." (Petition, pp. 21, 22.) Petitioner further states to this Court that he "offered respondents $5,000 in cash and 15 shares of Cold Metal stock, which he then valued at $4000 a share, in complete settlement." (Petition, p. 11.)

These and similar statements included in the petition simply do not reflect the facts as the record discloses and as both lower courts found.

The fact is, as reflected by petitioner's own testimony, that what was offered to respondents was not 15 shares of

stock in The Cold Metal Process Company, but rather a beneficial interest, only, in a single stock certificate representing 420 shares of the stock of The Cold Metal Process Company, which was impounded in escrow in a bank in Pittsburgh. Moreover, the alleged beneficial interest was to be subject to the retained right of the petitioner to alienate or dispose of the underlying stock at any time and on any terms which he deemed appropriate, without respect to the wishes of the respondents. That there may be no dispute about this fact, we set out the testimony from page 121 of the Record:

> "Q. This offer then, in effect, was to give them not 15 shares of stock but a certificate of beneficial interest in a certificate for 420 shares of stock in escrow with the bank?
>
> A. Well, true, but they were to get every cent of its value.
>
> Q. And under terms and conditions where you retained the right to sell that stock represented by the certificate of beneficial interest at whatever price you might determine upon?
>
> A. Yes.
>
> Q. So long as they got the same price as you did?
>
> A. True.
>
> Q. So they had no power over the disposition of that stock?
>
> A. Under this arrangement, no, *I had all that in my own hands.*
>
> Q. Now, it is true, is it not, that Lurie and Alper rejected that offer?
>
> A. Yes."

In this state of the Record, surely petitioner has no right to complain of the concurrent findings of the courts below that the rejection of the so-called tender was proper. (District Court Findings at R. 322, Court of Appeals concurred at 185 F. 2d 921, 930, R. 404.)

APPENDIX II.

Rules of Civil Procedure Involved.

The following Federal Rules of Civil Procedure, as amended, are involved in this case:

"Rule 52. Findings by the Court.

(a) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948."

"Rule 79. Books and Records Kept by the Clerk and Entries Therein.

(a) Civil Docket. The clerk shall keep a book known as 'civil docket' of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted

chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word 'jury' on the folio assigned to that action. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

"(b) Civil Judgments and Orders. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949."